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Supreme Court of the United States

OCTOBER TERM, 1956

No. 315

LILLIAN JUNE THOMAS, Petitioner

v.

WILLARD B. THOMAS

Petition for Writ of Certiorari to the Kansas City Court of Appeals State of Missouri

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Supreme Court of the United States

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No.

LILLIAN JUNE THOMAS, Petitioner

v.

WILLARD B. THOMAS

Petition for Writ of Certiorari to the Kansas City Court of Appeals State of Missouri

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the Kansas City Court of Appeals of the State of Missouri, affirming the judgment of the Buchanan County Circuit Court, granting a divorce to the respondent and awarding him the custody of the two minor children of the marriage.

OPINIONS BELOW

The trial court did not write an opinion but stated orally the reasons for the judgment. The oral opinion appears in the transcript. (Tr. 364-366) The stenographer's transcript of the opinion is Appendix A to this petition. The judgment of the trial court is attached hereto as Appendix

B. The opinion of the Kansas City Court of Appeals is reported. (See *Thomas* v. *Thomas,* 288 S. W. 2d 689.) It is printed below as Appendix C. The Supreme Court of Missouri did not write an opinion on denial of application to transfer the case requested by the petitioner; so there is no opinion by that court.

JURISDICTION

The judgment of the Kansas City Court of Appeals was entered March 7, 1956. It is Appendix D to this petition. A motion for rehearing and alternative request to transfer the case to the Supreme Court of Missouri was timely filed in the Kansas City Court of Appeals, March 19, 1956. (See the certificate of the clerk of that court, which is Appendix E to this petition.) An application for an order transferring the case from the Kansas City Court of Appeals to the Supreme Court of Missouri was filed in the Supreme Court on April 30, 1956. This application was denied by the Supreme Court of Missouri on May 14, 1956. (See Appendix F attached to this petition.) The time for filing this petition expires on August 13, 1956, and this petition is filed before that date.—See the certificate of the Clerk of the Court of Appeals, Appendix G to this petition.

Since the Supreme Court of Missouri denied the application for a transfer of the case, the writ of certiorari ought, therefore, to be directed to the Kansas City Court of Appeals, the court that possesses the record in this case, and not the Supreme Court of Missouri.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3). The Kansas City Court of Appeals had jurisdiction of this case under Section 13 of Article 5 of the Constitution of Missouri.

QUESTIONS PRESENTED

I.

Where the trial court granted the divorce and awarded the custody of the two minor children to respondent because of the religious beliefs and practices of petitioner, do the judgment of the trial court and that of the court of appeals abridge the rights of petitioner to freedom of worship guaranteed by the First and Fourteenth Amendments to the United States Constitution?

II.

Where the federal question was presented in the case for the first time by the opinion and judgment of the trial court based upon the evidence, was it timely raised by a motion for a new trial challenging the judgment of the trial court on the ground that it was in conflict with the First and Fourteenth Amendments to the United States Constitution?

HOW FEDERAL QUESTIONS RAISED

In the motion for new trial under ground 7 the petitioner stated:

"That the Court's finding that the practice of her religion by the defendant constituted indignities, is against the law and in violation of Article I, Section 5, Constitution of Missouri and Article I of the Amendments to the United States Constitution." (Tr. 369)

The motion for new trial was overruled by the trial court. (Tr. 371-372)

In the assignment of errors filed in the court of appeals petitioner stated under ground 7 thereof as follows:

"The court erred in failing to hold that the rights of appellant to practice her chosen religion had been abridged and denied by the decree of the court, contrary to Article I Section 5 of the Constitution of Missouri and the First and Fourteenth Amendments to the United States Consti-

tution."—See certified copy of brief filed in the court of appeals by petitioner at page 9.

The court of appeals refused to pass upon the federal question on the ground that presentation of it for the first time in a motion for new trial was too late. (See the opinion at page 33, *infra.*) This holding was itself a federal question properly raised in this petition.

STATEMENT OF THE CASE

This is a divorce case involving the right of custody to two minor children. Respondent, Willard B. Thomas, filed suit for divorce on September 7, 1954. (Tr. 1) Petitioner, Lillian June Thomas, answered and filed a cross bill for divorce on September 10, 1954. (Tr. 5) She prayed also that "the Court will award to defendant the entire care, control and custody of the minor children of plaintiff and defendant; that the Court will allow to defendant reasonable sums as and for alimony, child support and maintenance." (Tr. 4)

Respondent filed an amended petition for divorce on October 11, 1954. (Tr. 9) He prayed the court that he "be awarded the care and custody of the minor children herein named." (Tr. 9)

The trial began on October 21, 1954, in Division No. One of the Circuit Court of Buchanan County. (Tr. 10) At the conclusion of all the evidence the cause was argued. (Tr. 364) The court found for the respondent. (Tr. 364-366) On October 22, 1954, a judgment was entered divorcing respondent from the bonds of matrimony contracted with the petitioner and awarding respondent "custody and control of Dennis Michael and Stephen Daniel, minor children of plaintiff and defendant," provided that the petitioner would have the right to the custody of the children on Saturday and Sunday of each week and the right of "visitation with said minor children at all reasonable times." (Tr. 367)

On November 1, 1954, petitioner filed her motion for

new trial in which she claimed she was denied her rights guaranteed by the First Amendment to the United States Constitution. (Tr. 368-371) The motion was denied. (Tr. 371-372) Notice of appeal was duly and timely filed. (Tr. 371)

Willard and Lillian Thomas were married on October 22, 1945. (Tr. 256) Lillian had been married before and had a son, Gary, who was three years old at the time. (Tr. 256, 258) The name of her former husband was Sartain. (Tr. 342) The child lived with Willard and Lillian from the time of their marriage to the time of their separation in September, 1954. (Tr. 256) The boy, Gary, used the name of Thomas, to avoid confusion. (Tr. 342) He called Willard "dad." (Tr. 231, 342) Gary was supported by Willard. (Tr. 342)

The parties had two children born to them during marriage. (Tr. 98) The oldest is Dennis Michael (now nine years of age) and the youngest is Stephen Daniel (now five years of age). (Tr. 98) The family lived in St. Joseph and Willard and Lillian owned their own six-room home located outside the city limits. (Tr. 97, 120, 257) Willard paid for the house with his government bonds. (Tr. 130) He formerly drove a taxi but now is a patrolman on the police of St. Joseph and until recently did extra work at Burris Mills plant in St. Joseph. (Tr. 95-96, 98) He earns $260 per month as a policeman and received a salary of $130 per month from Burris Mills. (Tr. 98) He also receives a monthly government disability check for $15.75. (Tr. 121) Willard paid for all the groceries and the upkeep of the house, but he gave Lillian only $6.00 twice a month for her personal needs. (Tr. 133, 345) He had a bank account but did not allow Lillian to draw any money from it. (Tr. 253, 255, 321) She said: "If I had I would have gotten a beating." (Tr. 321) The money had been accumulated during marriage as a result of Lillian's "doing without things" she needed. (Tr. 340, 341)

Trouble between Willard and Lillian began when she

took up the religion of Jehovah's Witnesses. (Tr. 101, 104, 263, 264) He objected to her being active in the preaching work of Jehovah's Witnesses and attending meetings of the group. She refused to give up her newly found religion. (Tr. 101, 104, 263) When they were married in 1945 neither of them was active in any religion and neither attended church. (Tr. 122, 123, 257) They let a neighbor take her son by former marriage, Gary, to the Presbyterian Sunday school. (Tr. 139, 259)

Lillian became interested in religion after she gave birth to their first son. (Tr. 258-259) She first began going to the Baptist church, the church in which she had been brought up. (Tr. 257, 258) She took her sons Gary and Michael to the Baptist church several times. (Tr. 259) When she got religious she spoke to Willard and asked him to go to church with her, but he refused. He told her to take care of the religion of the family. (Tr. 259) She testified: "I only attended a few times because I wasn't satisfied with the religious training there. I wanted to learn about the Bible and what God's word of truth was, and it wasn't clarified to me there." (Tr. 259) "Well, it was when I was starting to church. I started discussing going to church with him and the children. However, he didn't see eye to eye with that. He didn't care to go himself. He told me to go ahead and take the children myself, that it was the mother's place to train them in religious affiliations." (Tr. 259)

During the year 1949 one of Jehovah's Witnesses called at her door and as a result of their discussion on the subject of religion Lillian agreed to have a regular weekly home Bible study. (Tr. 261) Michael, their first son, was three years old at the time. (Tr. 261) Lillian's sister, Mrs. Shewmaker, one of Jehovah's Witnesses, came regularly to her home and conducted a weekly Bible study with her. (Tr. 100, 181, 261-262) At first Willard was very pleased that Lillian was taking an interest in the Bible and religion. (Tr. 263) Lillian said that shortly thereafter he began to

object to her chosen religion because someone had misrepresented Jehovah's Witnesses to him. (Tr. 101, 263)

Lillian continued studying with Jehovah's Witnesses, began to attend their church meetings and finally was baptized in July, 1950, about two weeks after the birth of their second child. (Tr. 263) She thereupon dedicated herself to Jehovah God to serve Him as an active part-time door-to-door missionary and street preacher. (Tr. 263, 265) She went out in the door-to-door preaching work and distributed literature on the sidewalks of St. Joseph, averaging about two hours per week in this work. (Tr. 265-266) She also attended one-hour and two-hour meetings at the church meeting place of Jehovah's Witnesses on Tuesday night, Friday night and Sunday evening of each week. (Tr. 309-310)

Lillian studied the Bible in her home and taught it and the religion of Jehovah's Witnesses to her three children. (Tr. 267-268) She used the Bible and the literature of Jehovah's Witnesses, Bible study aids, in this home Bible study with her children. (Tr. 267-268)

Lillian, from the year 1950 to the time of the separation in September, 1954, also attended four regional meetings of Jehovah's Witnesses. (Tr. 304) These regional meetings were held annually. (Tr. 304) Three of these required her to travel away from St. Joseph, one time to Omaha, Nebraska, one time to Sioux City, Iowa, and the third time to Red Oak, Iowa. She went with others of Jehovah's Witnesses and took her children along, except for one time when she was gone only one night. (Tr. 302-304) Willard knew she intended to go on each of these trips but, when he was asked for permission, was equivocal. (Tr. 305) He would say "yes" and when she got ready to go, then, at the last minute, he would say "no." (Tr. 305) Lillian

went ahead to the assemblies and made the trips in spite of his objections. (Tr. 305)

Willard and Lillian frequently argued over her refusal to quit Jehovah's Witnesses and his demands that she stop association with the faith. When she refused to discontinue being one of Jehovah's Witnesses the trouble got worse and Willard wanted her to get a divorce from him. (Tr. 116, 329) She and Willard discussed divorce but she refused because she wanted to hold the family together and also because she did not believe in divorce except on grounds of fornication or adultery. Since he was not guilty of that she could not get a divorce. (Tr. 288-289, 290) He demanded that she get a divorce for over three years. (Tr. 329)

Willard had preconceived the idea of finally getting the divorce himself about one year before he actually separated from Lillian. He transferred the money from the bank account and invested it in bonds in the names of his mother and himself in October, 1953. (Tr. 363) At the trial he tried to frame Lillian by his use of the questionable testimony of a former taxicab driver he worked with before going on the St. Joseph police force. (Tr. 34-47) The testimony of Lillian and her witnesses irrefutably proves this testimony to be unbelievable. (Tr. 281-288, 321-328, 347-348)

During the period of time from July, 1950, to September, 1954, Willard beat Lillian several times and struck her with his fist on several occasions. (Tr. 291, 292, 293) She suffered a lump in her breast as a result of one of the attacks. (Tr. 189, 294) On September 5, 1954, in the nighttime when she returned home from a church meeting of Jehovah's Witnesses with the children she noticed the police patrol car with which Willard worked parked out in front of the house. In it was Willard's partner. (Tr. 290) She went to the house and noticed Willard was inside. She

attempted to get in the front door but could not enter. She sent one of the children around to the back door to enter and come to the front to let her in, which the child did. She entered and sat down on the divan. Willard came into the room where she was sitting and struck her. He beat her and then left. (Tr. 290-291) He then separated from her, moved out of the house and went to reside with his mother, taking the youngest boy, Stephen, with him. (Tr. 149) He refused to let Lillian see the boy. (Tr. 149-150)

All the evidence taken by the trial court related mainly to the issue of divorce or grounds therefor claimed by both parties. None of the evidence related to the competency of the parties to custody of the children. It was not shown that Willard was unfit to have the custody of the children. It also was not established that Lillian was not fit to have the custody of the children. The record is entirely silent on the incompetency of either Willard or Lillian to have the custody of the children. The morals of neither Willard nor Lillian were challenged.

The evidence relied upon by the trial court showed that Lillian had one of the boys out on the streets with her while she was distributing literature. It showed that Lillian had taught the children that the Bible forbade Jehovah's Witnesses to salute the flag and that Jehovah God forbade it. The evidence showed, however, that she did not force the children to this belief. She told them God's law on the subject and let them decide what they wanted to do. The evidence showed that Lillian, as a part of her religious beliefs, was against blood transfusions but she was in favor of using suitable blood substitutes recognized by the medical profession. The evidence showed that she taught her children the beliefs of Jehovah's Witnesses, that she took them to the meetings of Jehovah's Witnesses and that she was training them to believe and act as Jehovah's Witnesses.

Several witnesses testified to the good character and reputation of Lillian. (Tr. 167, 191, 215) While Willard accused her of using profanity, she denied it and there is no credible evidence to support the charge. (Tr. 76-77, 81, 115) Her son Gary, who lived in the same house with them, never heard his mother use any curse words. (Tr. 234)

Willard is now living with his mother, Genevieve Thomas, who is regularly employed with Montgomery Ward in a full-time job. (Tr. 61-62) She (the grandmother of Stephen) refused to permit Lillian to see Stephen when she came to the house after the separation. (Tr. 71) Willard said that, if the court gave him custody of the children, they would be properly supervised and that "one of us will be with them at all times." (Tr. 120-121)

The trial court made no finding of facts. His oral opinion merely referred to some of the reasons for his judgment, which gave the divorce to Willard. (Tr. 364-366)

The record in this case shows that there is no believable charge of misconduct on the part of Lillian established. The only charge that stands against Lillian in the record is that she was one of Jehovah's Witnesses, preached what she believed and taught her children to believe and practice her religion, that of Jehovah's Witnesses. The sole and only reason given by the trial judge in his oral opinion for the divorce and the award of custody was the uncompromising stand Lillian took for her religion.

REASONS FOR GRANTING THE WRIT

I.

The question, whether a disagreement between a man and his wife over proper religious practices of the wife or of the children is a basis for divorce and an order depriving the wife of custody to the children because of her religious practices, is of general interest and is of wide public importance.

Marriages with mixed religions of the parties is becoming increasingly common. (Nimkoff, *Marriage and the*

Family, Boston, Houghton Mifflin Co., 1947, p. 448) Cases of spouses acquiring religious beliefs for the first time in life after marriage are very familiar to all. There are a multitude of spouses who change their religion, either together or separately, after marriage. The constant proselyting that is going on among all religions is a factor making this a prevalent problem. Catholics sometimes change to Protestants and Protestants turn Catholic.—*Official Catholic Directory for 1955,* New York, P. J. Kenedy & Sons; *The Christian Herald,* New York, March 24, 1954.

These changes in religion are guaranteed by the constitutions to married persons as well as single persons. Freedom of conscience and religion is the most cherished freedom. It is of wide interest and of great public importance that this right be not infringed by a divorce decree. Since the final judgment of the court of appeals, based on the undisputed facts, has abridged the rights of petitioner to freedom of religion the Court should exercise its jurisdiction and order the writ of certiorari granted herein requested.

The first question above presented has not previously been decided by this Court. It was considered important enough by the Supreme Court of the State of Washington to decide in *Stone* v. *Stone,* 16 Wash. 2d 315, 133 P. 2d 526 (1943). See also *Cory* v. *Cory,* 70 Cal. A. 2d 563, 161 P. 2d 385 (1945). The holding of the court of appeals is in direct conflict with these decisions. Compare *Bedal* v. *Bedal,* 2 S. W. 2d 180 (Mo. App. 1928).

It is submitted that the question of whether petitioner may be divorced and have her children taken away on account of her religious practices that do not involve a violation of morals or do not endanger the health and life of others is of such wide general interest and great public importance that this Court should review and determine the question.

The divorce law of Missouri is that when cruel and inhuman treatment is relied upon for divorce it must be per-

sistent and repetitious. Isolated instances of verbal fights and domestic difficulties, however, give no grounds for any divorce. (*Cadenhead* v. *Cadenhead,* 265 S. W. 2d 426, 435, 436 (Mo. App. 1954); *Long* v. *Long,* 280 S. W. 2d 690, 694-695 (Mo. App. 1955); *Ramos* v. *Ramos,* 232 S. W. 2d 188, 196 (Mo. App. 1950); *Taylor* v. *Taylor,* 224 S. W. 2d 412, 416 (Mo. App. 1949)) On the record made here, when the religion of petitioner and her persistent practice of it are disregarded, as required by the Constitution—as it should have been done by the trial court but was not—grounds for divorce do not exist.

The trial judge correctly said that her beliefs were immaterial. But he did not stop there. He did not extend this ruling to her religious practices. He pulled the Constitution out from under them. He separated her practices from her beliefs and used those constitutionally protected acts as grounds for the divorce and the award of custody he granted to respondent. This was error because religious practices are also protected by the Constitution as long as they are not immoral or do not harm others. The Constitution guarantees freedom to live up to a religion as much as it secures the right to believe in a chosen religion. The Constitution secures freedom to practice what you believe. Without protection of action proving belief, your beliefs mean nothing, even though they are guaranteed by the Constitution.—See *Cory* v. *Cory,* 70 Cal. A. 2d 563, 161 P. 2d 385 (1945); *Stone* v. *Stone,* 16 Wash. 2d 315, 133 P. 2d 526 (1943).

The decree of the trial court, giving custody of the minor children to respondent, is an egregious error that defies the law of Missouri. The court, without any evidence of moral, mental, or physical incapacity, threw the law of Missouri, giving preference to the mother, to the winds. —Compare *Long* v. *Long, supra; Wells* v. *Wells,* 117 S. W. 2d 700 (Mo. App. 1938); *Brake* v. *Brake,* 244 S. W. 2d 786 (Mo. App. 1951); *Tuter* v. *Tuter,* 120 S. W. 2d 203, 206 (Mo. App. 1938); and *Cadenhead* v. *Cadenhead, supra.*

The trial court seemingly relied upon the old common law rule which gave preference to the father. But by act of the legislature of Missouri this common law preference has been abolished. (*Shine* v. *Shine,* 189 S. W. 403, 410-411 (Mo. App. 1916)) Under the present law the interest of the father or the mother is not determinative. The best interest of the child alone controls.—*Long* v. *Long, supra; Watkins* v. *Watkins,* 230 S. W. 2d 778 (Mo. App. 1950); *Mayo* v. *Mayo,* 244 S. W. 2d 415, 416 (Mo. App. 1951).

Respondent made no attempt to prove petitioner unfit to have the children. He did not offer one iota of evidence on this question. Petitioner did not attempt to prove respondent unfit. Neither of them was unfit to have the children. Both parties were qualified. Lack of proof of disqualification made mandatory the award to the mother.

The trial court chose to defy the legal preference of the law to petitioner, however, and he gave the children to respondent. Why? The trial court gave no reason. No factual finding of incompetency was made. It was merely concluded that it would be to the best interest of the children to be taken away from their mother. One child is of tender years, about 3 years of age at the time of trial and the other is at present 9 years of age.

The only reason for awarding custody to the father was the financial inability of the mother since her husband abandoned her and the ability of the father. It is interesting to note that the respondent—before he brought this divorce case—checked out all the money in the family bank account and got rid of all of the Government Bonds by fraudulent transfers. The money and bonds were given by respondent to his mother for the sole purpose of impoverishing petitioner, putting them beyond her reach as a creditor. Had the trial court given custody of the children to petitioner instead of placing them in the care of respondent's mother (with whom he lived at the time of the divorce), she would have been able financially to provide for them.

With the alimony to which she is entitled for the support of herself and her children, she could have amply taken care of them. So it cannot be said that she was financially unable to care for the children if and when the law of Missouri is properly applied in this case. Since this is the only ground supporting the award of custody it was an abuse of discretion to award the custody to respondent.

The court of appeals whitewashed the abuse of discretion of the trial court in denying petitioner her preferred rights to custody of the children. The court said that it could find no evidence of abuse of discretion. That court did not—and of course could not—find any evidence on the question because no evidence was offered. But the failure of respondent to discharge his burden of proof to show incompetency of petitioner was enough to prove abuse of discretion by the trial court. The trial judge received no evidence of moral, mental or physical incapacity of petitioner. The law of Missouri dictates that the children be given to her in the absence of such proof. The very fact that the trial judge defied the law of Missouri is enough to prove abuse of discretion.

It is not necessary to search the record for proof of incompetency of petitioner because none can be found. She was a model mother: loving, tender and affectionate to her children notwithstanding her religious zeal. The only thing that could be found "wrong" with her was her way of worship of her God. The charge of the respondent, and of the courts below as well, made by them about the incompetency of petitioner to have custody of her children calls to mind the case of the prophet Daniel. Concerning him it is said: "We shall not find any occasion against this Daniel, except we find it against him concerning the law of his God." (Daniel 6:5) But in this democratic land in this modern time any moral religious practice is no basis for such conclusion of incompetency of the mother in this case. When the trial judge took the children away from

the petitioner because of her religious practice this was itself an abuse of discretion.

This is an important question, therefore, which has not been decided but which should be decided by this Court.

II.

The petitioner could not challenge the constitutionality of the decision of the circuit court until it had been rendered. Her constitutional rights were not established and shown until the evidence was heard. She could not file a motion or paper in the case before the decision of the trial judge. She was not required illegally to anticipate an illegal decision that would amount to a denial of her constitutional rights.

The federal question of constitutional law was properly raised by assignment of errors in the court of appeals. An extensive argument upon the constitutional issue was made in briefs filed in that court. The only reason for refusing to pass upon the important question was that it was not presented in the trial court until the motion for new trial. The court of appeals said this was too late.

In making this holding the court of appeals entirely overlooked that it was unlike a case involving a state statute and that since it was the final judgment challenged, raising it in the motion for new trial was the first time that it could be presented. Since (1) the constitutions guaranteed freedom of religion and (2) it was presumed that the trial court would obey the constitutional mandate, it was not incumbent upon the petitioner to file a pleading before the decision and presumptiously anticipate. She did not have to accuse the trial judge ahead of his decision of denying her constitutional rights if he ruled against her.

The trial judge overruled the motion for new trial without an opinion, oral or written. This constituted an adjudication of the timely presented question. The decision of the court below that the question was not timely presented is out of harmony with the opinion of the Supreme Court

of Missouri in *Woodling* v. *Westport Hotel Operating Co.*, 331 Mo. 812, 819, 55 S. W. 2d 477, 479, 481-482.

It was erroneously stated by the court of appeals that the trial judge did not rely on the religious practices of the petitioner and ruled that religion had nothing to do with the case. This statement of the court below is misleading. The trial court at the trial, while ruling on a legal question, long before the final judgment, stated that religion did not have anything to do with the case. But the trial court, notwithstanding this holding, later did rely upon the religious practices of the petitioner. He ruled that her persistence in them was a basis for the divorce and for the order taking the custody of the two minor children away from petitioner.

This holding of the trial court was not made until the end of the testimony and at the time of rendering judgment. While the trial judge did not base his decision on her religious beliefs he did base the judgment on her religious practices of preaching and teaching the doctrines of Jehovah's Witnesses to the children and to others and her refusal to give up her religious practices objected to by her husband, the respondent; there was no other evidence in the record on which to base a divorce except the religious practices of the petitioner. No personal abuse or persistent illegal practice was shown, save and except her religious practices.

The denial of a federal right did not come into view until the final judgment. During the final argument of the case the trial judge had said that religion had nothing to do with the case. But he ignored his own ruling when he granted the divorce. While he gave petitioner her right to religious opinion, he took away her legal rights because of her legal religious practices. This was a surprising and unexpected denial of constitutional rights made plain for the first time in the final judgment.

Petitioner had no reason to anticipate and expect this abberation of the trial judge. She did not have to speculate

in advance that he would jump off the legal track and run the judicial vehicle into the ditch of unconstitutionality. The trial judge was presumed to stay on the road and follow the law of the road. When he defied the Constitution of the United States for the first time in the final judgment it was time enough to complain of it in the motion for a new trial.—*Woodling* v. *Westport Hotel Operating Co.*, 331 Mo. 812, 819, 55 S. W. 2d 477, 479, 481-482.

A federal question was presented to the trial court and to the court of appeals. The federal law rather than the Missouri law applies in determining whether the federal question was sufficiently raised.

Under the decisions by this Court the question was properly and timely raised and under those decisions the court of appeals had no authority to evade the question. (*Chicago, Burlington and Quincy Railroad Co.* v. *Chicago*, 166 U. S. 226, 231 (1897); *Stromberg* v. *California*, 283 U. S. 359 (1931); *Terminiello* v. *City of Chicago*, 337 U. S. 1, 5 (1949). Compare *Chapman* v. *Goodnow's Administrator*, 123 U. S. 540, 548 (1887); *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923); *Angel* v. *Bullington*, 330 U. S. 183, 188 (1947); *Brown* v. *Western Railway of Alabama*, 338 U. S. 294, 299 (1950)) The decision of the court of appeals is directly contrary to these holdings.

Challenging the constitutionality of a court decision is different from attacking the validity of a statute of the legislature. When a statute relied upon by a party in his pleadings is attacked then the unconstitutionality of the statute must be raised in the pleadings. But when a decision based upon all the evidence is alleged to deny constitutional rights then it cannot be raised until after the decision is made. When the appellate court refused to pass upon the question of whether the trial court by its final judgment on the evidence had abridged her constitutional rights this presented an important question of procedural law of the State of Missouri in constitutional cases that is of great public interest. The importance and general interest of

this question should be great enough to warrant this Court in exercising jurisdiction to take this case in for review and determination of this question.

CONCLUSION

The two questions here presented are of such great importance and general interest and rulings of the courts below are so out of harmony with the decisions of this Court that this Court should exercise jurisdiction and take this case in for review by granting this petition for writ of certiorari. Wherefore this Court is requested to grant a writ of certiorari to the Kansas City Court of Appeals of the State of Missouri for the reasons above stated.

Respectfully submitted,

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

August, 1956.

APPENDIX A

ORAL OPINION OF TRIAL COURT

(Rendered October 22, 1954)

IN THE
CIRCUIT COURT OF BUCHANAN COUNTY,
MISSOURI

WILLARD B. THOMAS,
Plaintiff

vs.

LILLIAN JUNE THOMAS,
Defendant

At the conclusion of all the evidence, and after arguments of counsel, a short recess was taken, after which the following proceedings were had:

THE COURT: Under the Constitution of the United States any person has the right to worship as they please. We have been assured that right by the Constitution and certainly it is my hope that we will continue to be assured that right to worship as we please. The fact that a wife believes one way and the husband believes another way, insofar as religion is concerned, is no ground for divorce whatsoever. Being a church man myself, certainly I would never criticize any of the faiths, the religion that has been brought up in this case, or any other that has not been mentioned here. In fact, it is my thought that no religion that I have ever heard of ever hurt anybody. I know of no exception to that statement.

Religion is not the question in this case and it will never be the question in any case in this court—that is, a person's beliefs—because they are entitled to that. The sole question in a divorce case is whether or not the parties

—that is, the husband and wife—have maintained their home and performed their duties toward each other. I want to say this, that in all marriages that I have heard about and in all contest divorce cases I have had, it proves to me all the more that there must be some give and take in marriages; it can't be all one way. Particularly a person can't have their own way when it is against the will of the husband or wife right straight through.

Now, in this case, Mrs. Thomas has insisted that she can leave this home whenever she wants to feeling that it is none of her husband's business, and she has left this home night after night over his protest, and never did I hear anything about a discussion of these absences from the home and a compromising spirit upon her part. Also, I find that she left in the daytime more or less whenever she felt like it and over the protest of her husband and had no willingness to cooperate or to discuss with him and compromise his protests. Further, she has gone on trips out of town over the week end over his protest at least four times. She takes the stand and admits that when they are vacationing in Colorado that she is unhappy on the vacation with her husband and her children along, for the reason that she wanted to be on a trip elsewhere.

The Court finds that this situation that I have just mentioned is the source of all the trouble in this home. The Court finds that this wife has become cold and indifferent toward her husband. These things that I have mentioned have built up to the extent that the Court considers them indignities that render the life of this husband intolerable, and the Court's judgment will be based upon that finding. (Tr. 364-366)

APPENDIX B

JUDGMENT OF TRIAL COURT

(Entered October 22, 1954)

IN THE CIRCUIT COURT OF BUCHANAN COUNTY, MISSOURI

WILLARD B. THOMAS,
Plaintiff

vs.

LILLIAN JUNE THOMAS,
Defendant

Thereupon, and on the 22nd day of October, 1954, the Court entered the following judgment:

The Court being now fully advised in the premises, finds that the plaintiff is the innocent and injured party, that the allegations contained in plaintiff's Petition are true, and that plaintiff is entitled to the relief for which he prays in his said Petition; the Court further finds in favor of the plaintiff and against defendant on said defendant's Cross-petition.

IT IS, THEREFORE, ordered, adjudged and decreed by the Court that the plaintiff be and he is hereby now and forever absolutely divorced from the bonds of matrimony heretofore contracted with defendant, the same are hereby set aside and for naught held and said plaintiff is by the Court restored to all the rights and privileges of an unmarried person.

It is, FURTHER, ordered and adjudged by the Court that plaintiff be and he is hereby awarded the care, custody and control of Dennis Michael and Stephen Daniel,

minor children of plaintiff and defendant, and that defendant shall have the right to have said children from 9:00 o'clock A. M. on Saturday of each week until 9:00 A. M. on Sunday of each week; and that defendant shall have the further right of visitation with said minor children at all reasonable times.

It is, FURTHER, ordered and adjudged that defendant be and she is hereby granted a judgment in the amount of Three Hundred Dollars ($300.00) as and for an attorney fee for her attorney, Ben F. York, said sum to be taxed against plaintiff, together with the costs herein expended, for which let execution issue. (Tr. 366-367)

APPENDIX C

OPINION OF COURT OF APPEALS

(Filed March 7, 1956)

IN THE KANSAS CITY COURT OF APPEALS
FEBRUARY SESSION, 1956

WILLARD B. THOMAS,
Respondent,
vs.
LILLIAN JUNE THOMAS,
Appellant.

No. 22267

Appeal from Buchanan County Circuit Court

Plaintiff, Willard B. Thomas, brought suit against his wife, Lillian June Thomas, in the circuit court of Buchanan county, seeking a divorce and the custody of the parties' two minor children. Defendant filed an answer and cross-petition, praying for a divorce, the custody of the minor children, an allowance for the support of the children,

alimony and attorney' fees. Both parties relied upon alleged intolerable indignities as grounds for divorce. The trial court granted plaintiff a divorce and awarded him the general custody of the children. The custody order also provided that defendant should have "the right to have said children from 9:00 a.m. on Saturday of each week until 9:00 a.m. on Sunday of each week," and that defendant should have the further right to visit the children at all reasonable times. Motion for a new trial was overruled, and defendant has appealed.

Plaintiff and defendant were married on October 22, 1945. In 1946, plaintiff bought a house and lot at 3738 South 11th Street, St. Joseph, Missouri, for $4000 cash, and title was taken in the names of plaintiff and defendant. The parties lived together in that house until their separation in 1954. Two children were born of the marriage; namely, Dennis Michael, now nine years of age, and Stephen Daniel, now five years of age. Defendant had been married before, and she had a son, Gary, by her first husband. Gary was three years of age when his mother married plaintiff and twelve at the time of the trial. He lived with plaintiff and defendant from the time of their marriage until their separation, and plaintiff supported him during that period. Defendant received no money from her former husband for the support of Gary. At the time of the trial plaintiff was employed as a policeman by the city of St. Joseph, at a salary of $260 a month, and he had been so employed for four years. In 1954 he also "worked extra at Burris Mills" for about three months and was paid $130 to $140 a month for such work. Plaintiff was injured while serving in the navy during World War II, and he received disability payments in the amount of $15.75 a month. In 1950, he bought a new Chevrolet automobile for $2000 cash. He testified that he purchased the car and the property on South 11th Street with the proceeds of savings bonds which he acquired before he married the defendant. Ex-

cept for a short period in 1946, defendant had never been gainfully employed since she married plaintiff.

The parents of both parties lived in St. Joseph. On September 5, 1954, plaintiff left the family home on South 11th Street and moved to the home of his parents, where he has since resided. After the separation, Dennis Michael lived at the home of plaintiff's parents for about a week and until the defendant went to the public school which the boy was attending and took him to her home. Thereafter, plaintiff went to defendant's home during her absence, obtained possession of their younger son, Stephen, and took him to the home of plaintiff's parents. The evidence showed that Stephen had been living with his father and paternal grandparents since that time. Defendant, Dennis Michael and Gary continued to live in the home on South 11th Street and they were living there at the time of the trial. Plaintiff instituted his action for divorce on September 7, 1954; defendant filed an answer and cross-petition on September 10, 1954; and the case was tried on October 21 and 22, 1954.

As stated, plaintiff and defendant were married in 1945. They evidently lived together amicably until July, 1950, when defendant became a member of a religious organization or sect known as Jehovah's Witnesses. Defendant testified at length concerning the teachings and doctrines of this sect, as did two of her witnesses, both of whom were members of the same organization. As we understand their testimony, Jehovah's Witnesses do not teach or advocate any violation of the laws of the state which are in harmony with the laws of God, but if the law of the state conflicts with God's law, as interpreted by the Witnesses, they will obey the law of God as so interpreted. They do not believe in saluting the flag of the United States, not because they do not honor the flag, but because of their conviction, based upon their interpretation of the Scriptures (Exodus, Ch. 20, verses 4 and 5), that saluting the flag is a form of idolatry. They do not believe in blood transfusions. De-

fendant testified that she was in favor of using suitable blood substitutes recognized by the medical profession.

The evidence showed that after defendant became one of Jehovah's Witnesses in July, 1950, she became quite active in the work of the sect; that she went from house to house distributing pamphlets and preaching the doctrines of the sect, sometimes taking the parties' children with her; that she distributed such pamphlets on the streets of St. Joseph; that on one occasion at least she had Dennis Michael distribute pamphlets on the streets; that she attended meetings of Jehovah's Witnesses at Kingdom Hall in St. Joseph; that between July, 1950, and the time of the separation, she made four trips out of town to attend regional meetings of Jehovah's Witnesses; and that she took her children with her on three of these trips. As stated in defendant's brief, the "evidence showed that she taught her children the beliefs of Jehovah's Witnesses, that she took them to the meetings of Jehovah's Witnesses, and that she was training them to believe and act as Jehovah's Witnesses."

Plaintiff did not believe in the doctrines of Jehovah's Witnesses, as he understood them. He testified that he was opposed to having his children taught such doctrines; that he objected to the influence exercised by defendant over his children in getting them to accept the interpretation of the Scriptures made by the sect, particularly as such interpretation pertained to saluting our flag; that he requested defendant not to teach these doctrines to their children but that she continued to do so. There was quarreling in the family as the result of this difference of opinion.

Plaintiff testified: "Q. How many hours during the day or week would she be absent from your home in connection with this religious matter? A. Three or four times a week from half a day to a full day. She stated that sometimes she had been over in Kansas recruiting members, other times here in town getting in her hours. Usually she went on Sunday evening, Tuesday evening and Friday evening.

That was meeting night. She stated she went down there. Where she went I don't know but she was gone mostly every Sunday, Tuesday and Friday evening from 7:00 until almost midnight. Q. What about the children? A. When I was there I would keep them. * * * I would take care of them when I was working the Midnight to morning shift. When I was working 4:00 to 12:00 she took them with her * * *. Q. And that continued for a number of years? A. That is right * * *. When I was working 4:00 to 12:00 I didn't know where she went. She said she went to the hall * * *. I drove past there several times and I saw her in the hall several times. * * * Sometimes she missed and didn't go out but maybe once or twice during the week, but she was pretty determined and she made it most of the time." Defendant testified: "Q. Over the period of years since your immersion, what would you say had been the general average of the time spent out in the service by you * * *? A. I would say approximately two hours a week." She also testified that she attended one-hour and two-hour meetings at Kingdom Hall on Tuesday night, Friday night and Sunday evening of each week. Plaintiff further testified: "Three or four times a week she wasn't there to prepare my meals. I never knew when I went home whether she would be there or not. Q. If she wasn't there what would you do? A. Went to my mother's most of the time, now and then went to a restaurant." This testimony was corroborated to a certain extent by plaintiff's mother and two police officers who worked with plaintiff. Referring to plaintiff's testimony that on many occasions she failed to prepare his meals, defendant testified: "When I knew that he was coming home * * * I was always there" to prepare his meals.

Plaintiff testified that during the time he lived with defendant he performed his duties as a husband and father to the best of his ability; that he supported his stepson, Gary, for nine years; that he paid all of the household and family expenses; that he paid all of the bills because de-

fendant "never had time, she said, to pay them"; that he paid for "her makeup and everything else"; and that he gave defendant $6.00 every two weeks "to spend on whatever she wanted"; that after they moved into the house on South 11th Street, he bought all of the groceries and carried them home. When he was asked on cross-examination whether "other people" had given defendant used clothing, he said: "I don't know. * * * I know she had a charge account at the Paris. * * * I just paid it off. * * * I let her charge things." Defendant testified that plaintiff gave her $6.00 every two weeks "for her personal needs" after she told him she would not do the washing and ironing unless he gave her that amount every two weeks. She said: "Before that it was about $3.00. * * * My husband forbade me to draw any money out of the bank without his permission. * * * If I had I would have gotten a beating."

Plaintiff testified that on many occasions defendant cursed him and called him vile names; that she called him "an unbelieving son of a b—— atheist"; that she said "it was wrong" to use such language but that he "caused her to do it" by "objecting to her running all over the country in that Witness business". Plaintiff denied that he was an atheist. He said: "I believe in God Almighty." Defendant denied that she "called him names and cursed him." Plaintiff further testified: "She kept telling them (the children) that I was no good because I carried a gun. * * * I suppose that was her belief. My boy (Dennis Michael) eight years old told me many times, 'You are no good, you carry a gun.' " Defendant denied that she told the children plaintiff was no good because he carried a gun.

Plaintiff testified that on one occasion defendant accused him of stealing "her purse with $24 in it," and continued: "Q. Where did she say that to you? A. Down at Mr. Carl Cole's. I was talking to him and she came down and as I remember it said, 'You stole my purse with that $24,' and says, 'He is keeping it for you,' and pointed to Mr. Cole, and of course I told her I didn't know anything

about it. * * * I never took her $24." Plaintiff's testimony concerning the statements made by defendant was corroborated by the testimony of Mr. Cole, who also stated that plaintiff never gave him any money for safekeeping. Defendant and her oldest son, Gary, earned part of the $24 by picking and selling raspberries. Defendant testified: "We were going to use it to go to an Assembly (a meeting of Jehovah's Witnesses). * * * (O)ne morning I found him (plaintiff) with the wallet in his hand and the money in the other hand. * * * I said, 'You know I want that to go to the Assembly on.' So then he said, 'No, you are not going to get it.' * * * (H)e has rather small hands and I have rather large ones, and I was able to force his hand open and get the money out of it, and then I hid it in a different place, * * * and again he got it, and again I took the money out of his hands, and the third time the money disappeared completely after I hid it in the dining room cabinet * * *." (Plaintiff weighed 200 pounds and defendant weighed 107). Defendant further testified: "After I told him (plaintiff) I thought he took the money, he went down to Mr. Cole's house * * *. So I went down to his house and I said to Mr. Cole, 'Did he ask you to hold any sum of money for him,' and Mr. Cole said, 'No,' and I said, 'Well I think he has taken my money * * *.'" Plaintiff testified on cross-examination: "Q. Was there ever any occasion when your wife came to you and said, 'You have got my $24' and took the $24 out of your hand? A. No, I don't remember that." There was other testimony concerning the $24 but it need not be stated here.

This is plaintiff's description of another incident that took place at the parties' home: "We were in the living room, I think some of them watching television, my mother and sister and myself, and she (defendant) had started around the house * * * to go to a meeting, Jehovah meeting somewhere, and she saw them in there and came back in and said, 'I am tired of your damned relations here.' She said, 'I don't want any unbelievers here that don't believe

in Jehovah's Witnesses.' * * * She says, 'You I hate more than any' to my sister, and she made a lunge at my sister and I grabbed my wife to protect my sister" and prevent a fight. "My sister and mother and dad took out. * * * (They have) not been back since. * * * Q. When did that happen? A. It was about three years ago, I imagine." Defendant did not deny these charges. The testimony of plaintiff's mother and sister concerning this incident was substantially the same as that of plaintiff.

Prior to their separation the parties had a television set in their home. When plaintiff was asked what defendant did when "the Star Spangled Banner was played and the American flag was shown on television", he said: "She started beating on pans and booing and most of the time jerked the plug out of the wall so the television set wouldn't operate. * * * She would grab them (the children) and take them in the other room * * *. She said that (the television set) was the work of Satan. * * * (E)very time a preacher came on or the flag or a Catholic priest * * *, she would turn it off or yank the plug out * * *." Defendant denied all of this. She testified that "when Bishop Sheehan came on, or any minister", she "went out of the room" because she "didn't want to listen". When plaintiff was asked whether there had been "any improvement in her conduct and her attitude toward (him) and the family", he replied: "It got worse and she got colder all the time. She wasn't affectionate to me or the children at all."

In July of 1953, plaintiff took defendant and the three children on a motor trip to Yellowstone National Park; and in July of 1954, he took them on a trip to Colorado Springs. Defendant testified that she was "very unhappy" on the trip to Yellowstone, because she wanted to attend a meeting of Jehovah's Witnesses in New York; that plaintiff said the only reason he was taking the family to Yellowstone was to prevent her from attending "the New York Assembly". She testified that she wanted to make the trip to Colorado Springs, then stated that she suggested that

plaintiff take his mother, and that she did not "care anything about trips anyway".

As stated, plaintiff left the family home on September 5, 1954, and went to the home of his parents where he has since resided. As to the separation, plaintiff testified: "I came home to get my clothes to go to Burris Mills and she came a short time after I was there, and I objected to her staying at that hall until 10:00 that night, and that is when the trouble started, and she picked up a croquet mallet and tried to hit me and said I was always standing in her way, and I pushed her down on the divan * * *. Q. Did your wife have the youngest child in her arms when she came in that night? A. No, she was leading him, if I remember right * * *. Q. Did she fall on the divan that night? A. She fell on it when I pushed her. It has got an arm on it. She could have bruised herself." He further testified: "That night I got tired of it and I left." This is defendant's version of the separation: "The children and I came home from Kingdom Hall about 9:30 or a quarter of 10:00 * * *. He (plaintiff) came out of the bathroom after I had seated myself on the divan and rushed at me and said, 'You dirty so and so.' * * * (H)e struck me in the chest with his fist and then he proceeded to hit me on top of the head also, and in doing that he slapped the baby * * *, and he rushed out when the baby started to cry. * * * As he went out the door, he said, 'That is all, I am through,' and he left." Plaintiff denied these charges.

Defendant testified that on numerous occasions plaintiff called her vile names, such as son of a b——; that he had called Jehovah's Witnesses bad names in the presence of his children; and that he frequently struck her. She stated that on one occasion plaintiff struck her across the hips and legs and arms with a ramrod; and that when she asked him why he did that, he said because she went to a meeting after he told her not to do so. On another occasion, according to defendant, plaintiff hit her with a yardstick while she was asleep. She said he hit her because he had

cut his finger on a razor blade which she had left in the bathroom. Defendant testified: "One time when I got back from an assembly my screaming woke the children and they came running in because of it, and he had me down on the floor just knocking the stuffings out of me, you might say." In describing another incident, defendant said: "One of the parakeets had gotten out of the cage during our absence and he was sitting on the floor, and the cat pounced right on him. * * * My husband blamed me for it and he picked up the bird cage and hit me over the head with it and across the back, and then he took the bird cage and proceeded to stamp it all to pieces." Plaintiff denied all of these charges. He said: "I have pushed her but I never struck her * * *. I never did call her any names."

Plaintiff's stepson, Gary, age twelve, gave testimony in behalf of his mother concerning the occurrence on September 5, 1954, when plaintiff left his home and went to live at the home of his parents. Gary testified: "I don't remember anything that was said. * * * She (defendant) had put the baby down on the divan and sat down with him, and he (plaintiff) came in and hit her on the chest." He further stated that on several occasions he saw plaintiff hit defendant and heard him curse her; that he never heard defendant use "any curse words"; and that no one had told him what to say when he testified at the trial.

There were other incidents, charges and denials on both sides before and after the separation, but those related present a fair picture of the conflict between the parties and are sufficient for the purposes of this opinion.

Frank L. Reiser, a police captain in St. Joseph, testified that he had know plaintiff about six years. He stated that plaintiff's reputation in the community was very good, and that plaintiff was an efficient police officer. Francis R. Ross, a neighbor and former employer of plaintiff, testified that plaintiff conducted himself properly and had always been "hardworking and a good provider".

Mrs. Mildred Bright, a school teacher, testified that

defendant's son, Gary, was one of her pupils during the school year 1952-1953; that the parties' older son, Dennis Michael, attended the same school; that she saw Dennis Michael "on the playground and at lunch time"; and that the two boys "were well dressed and clean". Mrs. Mary Musser, Mrs. Opal Scruggins and Mrs. Wyvonia Jones, witnesses for defendant, testified that they had known defendant about five years; that they had never heard her use "any profane language or curse words"; and that her reputation for truth and morality was good. Defendant's sister, Mrs. Carolyn Shewmaker, stated that she had been in defendant's home many times and that defendant was a good housekeeper. Mrs. Shewmaker's daughter, Joyce, stated that "at various times" she had been at Kingdom Hall in St. Joseph when defendant was there with the three children; that on such occasions the children were well dressed and well behaved; and that defendant's home was always clean and well kept. She admitted that plaintiff "always provided well for his family". All of these witnesses were members of the organization called Jehovah's Witnesses except Mrs. Bright.

Defendant contends (1) that "upon a review of the whole record this court should reach the conclusion that defendant was entitled to the divorce and the plaintiff was not entitled thereto"; (2) that "the court abused its discretion when custody of the minor children was awarded to the plaintiff"; and (3) that "the judgment of the court below denied defendant her right of freedom of worship and of religion, contrary to Article 1, Section 5 of the Constitution of Missouri and the First and Fourteenth Amendments to the United States Constitution". Defendant states that the "sole basis of the decree of divorce was that defendant left the house 'whenever she felt like it and over the protest of her husband' to worship Almighty God Jehovah"; and that "the record in this case shows that the only reason the children were taken away from defendant was that of her religion"; and consequently that the judgment ap-

pealed from denied defendant her constitutional "rights of freedom of worship and of religion".

If this case involved the "construction of the Constitution of the United States or of this state", this appeal would be within the exclusive appellate jurisdiction of the Supreme Court (Const. 1945, Art. V, Sec. 3, 2 V.A.M.S.), and it would be our duty to transfer the cause to that court. But, in order to preserve a constitutional question for appellate review the question must be raised at the first available opportunity, and the point must be presented in the motion for a new trial, if any. City of St. Louis v. Butler Co., 358 Mo. 121, 219 S. W. 2d 372. There is an exception to this rule; namely, where, on the whole case, some provision of the constitution was either directly or by inexorable implication involved in the rendition of the judgment and decided against the appellant. Lohmeyer v. St. Louis Cordage Co., 214 Mo. 685, 113 S. W. 1108. That exception has no application here. In the instant case defendant made no attempt to raise or present a constitutional question until she filed her motion for a new trial. In paragraph 7 of that motion defendant alleged that "the court's finding that the practice of her customary religion by the defendant constituted indignities, is against the law and in violation of" the constitutional provisions cited in defendant's brief. The trial court made no such finding. On the contrary, at the close of all the evidence, and after arguments of counsel, the trial judge said: "Under the Constitution of the United States any person has the right to worship as they please * * *. The fact that a wife believes one way and the husband another way, insofar as religion is concerned, is no ground for divorce. * * * The sole question in a divorce case is whether or not the parties * * * have maintained their homes and performed their duties toward each other." It is clear that no constitutional question can be presented on this appeal.

While each divorce action based on alleged general indignities must be determined on its own facts, the courts

have said repeatedly that indignities, such as to warrant the granting of a divorce, ordinarily must amount to a continuous course of conduct. A single act, or occasional acts, will not suffice. The acts relied upon must amount to a species of mental cruelty, and must evidence a course of conduct by one of the parties toward the other whereby the other's condition is rendered intolerable through acts of such character and frequency as to be subversive of the family relation. Clemens v. Clemens, Mo. Sup., 235 S. W. 2d 342, 346; Hoffman v. Hoffman, Mo. App., 224 S. W. 2d 554, 561; Key v. Key, Mo. App., 93 S. W. 2d 256, 259.

In the case at bar there was a direct conflict in the testimony on almost every charge and countercharge. If plaintiff's evidence be accepted as true, he was entitled to a decree of divorce. Plaintiff's evidence, as a whole, was substantial. It disclosed a course of conduct on defendant's part extending over a period of about four years, the cumulative effect of which may well have rendered plaintiff's condition intolerable. It is our duty, of course, to review the whole record and reach our own conclusions in divorce cases, but where, as here, the decision depends largely upon the credibility of the witness, we must give due deference to the conclusions of the trial judge who saw and heard all of the witnesses, and we are not authorized to set aside the judgment unless clearly erroneous. Sec. 510.310 (4), R. S. Mo. 1949, V.A.M.S. Applying this rule, we defer to the conclusion of the trial court that plaintiff was the innocent and injured party and therefore entitled to a decree of divorce. We turn to defendant's contention that the court erred in awarding the custody of the parties' children to plaintiff. As stated, after the separation plaintiff took the younger boy, Stephen, to the home of plaintiff's parents and Stephen has been living there since that time. Plaintiff's mother testified that she was employed "in the daytime" at "Montgomery-Ward"; that her husband did not work and was at home "all the time"; and that plaintiff always stayed at home with Stephen when he was not on

duty. Plaintiff testified that he was living with his parents; that their home was a modern six-room house with three bedrooms, located a block and a half from Webster School; that if he were awarded the custody of the children they would be "properly supervised and have all their care and affection, and one of us will be with them at all times"; that his mother had been taking Stephen to Sunday School at the Second Presbyterian Church; that his mother was a member of a church at Halleck, Missouri, and about ten miles from St. Joseph; that when he was a boy he attended services at a Presbyterian Church; that when he was in the navy he attended church services every Sunday, and continued: "I study the Bible but I haven't been attending church." As we have seen, at the time of the trial, defendant, Gary and the parties' older son, Dennis Michael, were living in the home at 3738 South 11th Street. Defendant testified that if she were awarded the custody of the parties' children she would need money for their support, and that she "could get a job very easy". She did not say who would care for the children when she was working.

Defendant insists that the best interests of a child of tender years requires that it be placed in the custody of its mother. Ordinarily, as between the father and mother, the mother will be awarded the custody of such a child unless it be shown that she is unfit to take charge of the child or that she cannot provide it with a suitable home. It is well settled, however, that "the findings of the trial court in matters involving the custody of a minor child of divorced parents, while not binding upon the appellate court which must review the record for itself, are nevertheless not to be lightly disturbed, and will be deferred to unless the court is firmly convinced that the welfare of the child requires some other disposition." Lutker v. Lutker, Mo. App., 230 S. W. 2d 177, 179. Under the record in this case, we cannot say that the trial court abused its discretion in awarding the custody of the children to plaintiff.

The judgment should be affirmed, and the commissioner so recommends.

J. COY BOUR
Commissioner

SPERRY, C., concurs.

PER CURIAM.

The foregoing opinion of BOUR, C., is adopted as the opinion of the court. The judgment is affirmed.

All concur.

APPENDIX D

JUDGMENT OF COURT OF APPEALS

(Filed March 7, 1956)

KANSAS CITY COURT OF APPEALS
FEBRUARY SESSION, 1956

Willard B. Thomas,
Respondent,
vs.
Lillian June Thomas,
Appellant.

No. 22267

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Buchanan County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against

the said appellant costs and [illegible]nd charges herein expended, and have therefor execution.

(Opinion filed.)

STATE OF MISSO[illegible]OURI—Set.

I, RENICK JONES, C[illegible] Clerk of the Kansas City Court of Appeals, certify that th[illegible]he foregoing is a full, true and complete transcript of the [illegible] judgment of said Kansas City Court of Appeals, entere[illegible]ed of record at the February Session, thereof, 1956, and [illegible]d on 7th day of March, 1956, in the above entitled cause.

Given under my hand [illegible] and the seal of said Court, at Kansas City, Missouri, this [illegible]is 12th day of July, 1956.

Renick Jones, Clerk

APP[illegible]PENDIX E

ORDER OF CO[illegible]URT OF APPEALS OVERRULING MOT[illegible]TION FOR REHEARING OR TO TRANSFER T[illegible]TO SUPREME COURT OF MI[illegible]ISSOURI

(Filed [illegible] April 2, 1956)

KANSAS CITY [illegible]COURT OF APPEALS
APRIL [illegible] SESSION, 1956

WILLARD B. THOMAS,
Respondent,
vs.
LILLIAN JUNE THOMAS,
Appellant.

No. 22267

Now at this day the C[illegible]ourt having considered and fully understood the appellant's motion for a rehearing or in the alternative to trans[illegible]fer to the Supreme Court of

Missouri, doth consider and adjudge that the said motion be and the same is hereby overruled.

STATE OF MISSOURI—Set.

I, RENICK JONES, Clerk of the Kansas City Court of Appeals, certify that the foregoing is a full, true and complete copy of the order of said Kansas City Court of Appeals, entered of record at the April Session thereof, 1956, and on the 2nd day of April 1956, in the above entitled cause.

Given under my hand and the seal of said Court, at Kansas City, Missouri, this 12 day of July, 1956.

Renick Jones, Clerk

APPENDIX F

ORDER OF SUPREME COURT OF MISSOURI DENYING APPLICATION TO TRANSFER

(Filed June 1, 1956)

KANSAS CITY COURT OF APPEALS
April Session, 1956.

Willard B. Thomas,
Respondent,
vs.
Lillian June Thomas,
Appellant.

(Supreme Court No. 45591)
No. 22267

Now at this day, on consideration of appellant's application to transfer the above entitled cause from the Kansas City Court of Appeals, it is ordered that said application be and the same is hereby denied.

STATE OF MISSOURI—Set.

I, RENICK JONES, Clerk of the Kansas City Court of Appeals, certify that the foregoing is a full, true and complete copy of the order of the Supreme Court of Missouri filed in my office on June 1, 1956, and entered of record at the April Session thereof, 1956, and on the 1st day of June 1956, in the above entitled cause.

Given under my hand and the seal of said Court, at Kansas City, Missouri, this 12 day of July, 1956.

Renick Jones, Clerk

APPENDIX G

CERTIFICATE OF CLERK OF COURT OF APPEALS

(Dated July 12, 1956)

IN THE KANSAS CITY COURT OF APPEALS
JUNE SESSION, 1956.

WILLARD B. THOMAS, *Respondent,* vs. LILLIAN JUNE THOMAS, *Appellant.*	Buchanan	No. 22267

STATE OF MISSOURI, Set.,

I, Renick Jones, Clerk of the Kansas City Court of Appeals do hereby certify that the above and foregoing is a full, true and complete transcript of the record filed in my office on June 4, 1955; of the opinion of this Court filed in my office on March 7, 1956; of the copy of judgment and order of affirmance entered of record on March 7, 1956; of appellant's motion for rehearing or transfer to the Supreme Court of Missouri, filed in my office on March

er of this Court overruling said
19, 1956; and the ord 6; and the order of the Supreme
motion on April 2, 19 May 14, 1956 and filed in my office
Court of Missouri date g application to transfer to said
on June 1, 1956, deny souri, all as the same appears of
Supreme Court of Mis y office.
record and on file in m

IN TESTIMONY W HEREOF, I have hereunto set my
hand and affixed the s eal of the Kansas City Court of
Appeals at my office i Kansas City, Missouri, this 12th
day of July, 1956.

Renick Jones
Clerk.